

REMARKS

This reply is fully responsive to the Office Action dated October 22, 2003, and is filed within four- (4) months following the mailing date of the Office Action. Accompanied herewith is a petition for extension of time under 37 CFR §1.136(a) to extend the period for filing this reply in the above identified application. Appropriate fees for extension of time for a one- (1) month period is enclosed.

Claims Status Summary:

Claims 1 - 16 are pending in the application.

Claims 1 - 16 were rejected under 35 U.S.C. 103(a) as being unpatentable over Matsuura et al (Jap. Pat. No. 1026241) ("Matsuura") in view of Nagao et al (Jap. Pat. No. 7059553) ("Nagao").

I. Claims Amended:

The Applicants have amended claim 7 to correct a simple typographical error, and amended claim 10 to correct antecedence for the term "rapid Pasteurization". Neither of the amendments made herein is limiting, and no new subject matter is added.

II. Claims Rejection - 35 USC 103(a):

The Office Action rejected claims 1 - 16 under 35 U.S.C. 103(a) as being unpatentable over Matsuura et al (Jap. Pat. No. 1026241) ("Matsuura") in view of Nagao et al (Jap. Pat. No. 7059553) ("Nagao"). Applicant respectfully traverses the rejection and the modification and interpretation of the references.

Remarks for claim 1:

Claims 2 - 6 depend from claim 1, and hence include all the limitations of this base claim.

The Office Action acknowledges that "Neither of the abstracts of Matsuura or Nagao teaches the addition of a preservative..." Applicants have included a certified translation of these references to confirm that neither Matsuura et al nor Nagao et al taken individually or in combination teach or suggest (implied or otherwise) the claimed limitation of "...*adding a preservative to produce fully stabilized flavored sake.*"

Claim 1 recites, *inter alia*,

"...contacting a quantity of sake with a quantity of finely divided fresh produce to form a sake mixture;

aging the produce sake mixture at a reduced temperature for a predetermined time;

separating the aged produce sake mixture into a raw flavored sake and insoluble material;

subjecting the raw flavored sake to a rapid pasteurization process to produce pasteurized flavored sake;

adding a preservative to produce fully stabilized flavored sake."

For the purposes of illustration, but not limitation, the prior art references do not contain any suggestions (express or implied) that they be combined, and that they be combined in the manner suggested by the Office Action. A mere glance through the references will reveal that each reference is complete and

functional in itself, so there would be no reason to use parts from, add, or substitute part to any reference. In fact, a quick read of the references reveal the existence of substantial differences in producing different types of flavored sakes, such as those produced using fruits, herbs, spices, etc. (Matsuura et al) verses fruit juice (Nagao et al). Therefore, to combine the references in the manner suggested by the Office Action (whether for pasteurization, addition of a preservative, or any other reason), it would be necessary to make modifications to the references that are not taught. These important substantial differences also extend to the claimed limitation of "...adding a preservative to produce fully stabilized flavored sake."

In general, the use of any preservative should have enough strength to counter various degrees of fermentation processes within flavored sake, and should not degrade the taste or flavor of the sake. Therefore, even if hypothetically, a preservative for a fruit juice flavored sake (Nagao et al) is found through extensive experimentation, it may not be used with fresh produce flavored sake because of the higher degree of fermentation process that might occur by the introduction of fresh produce. This is because the fermentation level (or degree or strength) of fresh produce is different from fruit juices, and therefore the preservatives used must have commensurate opposing abilities to account for and counter the stronger fermentation processes. One might naively believe that merely adding a greater quantity of the same hypothetical preservative used for fruit juice flavored sake to a fresh produce flavored sake would work. However, the particular type of preservative used for fruit juice flavored sake may

never be chemically strong enough to control the fresh produce fermentation process - regardless of the quantity used. Furthermore, the addition of more of the same imaginary preservative to any type of flavored sake may also have an adverse effect on its taste and sometimes be harmful.

Accordingly, as is clearly taught by the existing differences between the teachings of the references, the combination suggested by the Office Action requires a series of separate, awkward combinative steps that are too involved to be considered obvious (for whatever reason), and not suggested or taught (implied or otherwise) by the prior art. Hence, it is respectfully submitted that those skilled in the art would find it impossible to combine the references in the manner suggested by the Office Action due to their substantial differences.

Applicants respectfully submit that even if references somehow combined, the combined teachings of the references would not meet the claimed limitation of adding a "...preservative..." to the resulting flavored, pasteurized sake as is acknowledged by the Office Action. The fact that no reference teaches the addition of preservative as claimed to meet the invention is evidence of unobviousness. In fact, if the invention were obvious, because of its advantages, those skilled in the art (e.g. the sake producing industry) surely would have implemented it by now. That is- the fact that those skilled in the art have not implemented the invention, despite its great advantages, indicates that it is not obvious.

Up to now those skilled in the art thought or found the problem of adding a preservative to sake, solved by the presently claimed invention, was insoluble,

and in fact shunned. However, the presently claimed invention has converted failure by others in the industry into success. In addition, the failures of prior art workers to add a preservative to sake and to add it in a manner claimed indicate that the solution found by the presently claimed invention was not obvious.

The invention therefore is contrary to the teaching of the prior art and the sake producing industry as a whole, that is, the invention goes against the grain of what the industry or the prior art teaches by the claimed addition of a preservative. Therefore, although preservatives have a so-called "...art-recognized purpose, i.e. extending shelf life..." as the Office Action states, their use in the sake producing industry is not "art-recognized", and in fact it is the opposite - it is shunned. Hence, the prior art and the industry as a whole teach away from the claimed limitation of adding a preservative to sake. Accordingly, the addition of a preservative in sake as claimed is not recognized by the art (e.g. the sake producing industry).

Accordingly, Applicants respectfully request withdrawal of the rejection of claim 1 under 35 U.S.C. 103(a) because neither Matsuura et al, nor Nagao et al, nor the so-called "art-recognized" industry standards, taken individually or in combination render as obvious the claimed limitations for the aforementioned reasons. Hence, Applicants respectfully submit that claim 1 is allowable over the cited references and solicit reconsideration and allowance of this claim.

Remarks for claims 2 - 6

Since claims 2 - 6 depend from claim 1 and incorporate all of its limitations, they are patentable for the same reasons given with respect to claim

1, and even more patentable because they add additional limitations which further distinguish them from the references cited. Therefore, Applicants respectfully solicit reconsideration and allowance of claims 2-6 as well.

Remarks for claim 7

Claims 8 - 16 depend from claim 7, and hence include all the limitations of this base claim. Claim 7 recites, *inter alia*,

"...contacting a quantity of sake with a quantity of whole produce concentrate;

blending the whole produce concentrate and the sake to form a produce sake mixture;

subjecting the produce sake mixture to a rapid pasteurization process to produce pasteurized flavored sake; and

adding a preservative to the pasteurized flavored sake to produce fully stabilized flavored sake."

The Office Action acknowledges that neither Matsuura et al nor Nagao et al teach the addition of a preservative to flavored sake (using concentrates or any other methods). The Office Action states that "...the use of concentrates in lieu of produce solids is notoriously well known", and further states that "it would have been obvious to those skilled in the art to add a produce concentrate to sake rather than fresh produce for its recognized art benefit."

In other words, for the purposes of illustration, but not limitation, neither Matsuura et al, nor Nagao et al, nor any so-called "art-recognized" industry

standards taken individually or in combination teach or suggest (implied or otherwise) the following specifically claimed limitations:

- "...contacting a quantity of sake with a quantity of whole produce concentrate;"
- "...subjecting the produce sake mixture to a rapid pasteurization process to produce pasteurized flavored sake;" and
- "...adding a preservative to the pasteurized flavored sake to produce fully stabilized flavored sake."

Applicants are not merely claiming replacing fresh produce by their equivalent concentrate to process and manufacture flavored sake; although it should be noted that even if this was the case, none of the references cited teach it. Applicants respectfully submit that all the claimed features recite novel processes for manufacture of sake, which distinguish over any possible combination of any of the references cited for the same reasons given above with respect to claim 1, and even more so because no reference teaches the use of concentrates.

Accordingly, Applicants respectfully request withdrawal of the rejection of claim 7 under 35 U.S.C. 103(a) because neither Matsuura et al, nor Nagao et al, nor any so-called "art-recognized" industry standard, individually or in combination render as obvious the claimed limitations for the aforementioned reasons. Hence, Applicants respectfully submit that claim 7 is allowable over the cited references and solicit reconsideration and allowance of this claim.

Remarks for claims 8 - 16

Since claims 8 - 16 depend from claim 7 and incorporate all of its limitations, they are patentable for the same reasons given with respect to claim 7, and even more patentable because they add additional limitations which further distinguish them from the references cited. Therefore, Applicants respectfully solicit reconsideration and allowance of claims 8 - 16 as well.

Remarks for the cited court case *In re Levin*, 84 U.S.P.Q. 232:

As to the cited case *In re Levin*, 84 U.S.P.Q. 232, it is respectfully submitted that the Office Action's reliance on *Levin* is believed to be misplaced, and the evidence for this is in the very first line of the quoted case: "This court has taken the position that new recipes or formulas for cooking food..." It is respectfully submitted that Applicants' claims have nothing to do with recipes or formulas for cooking. They are directed to manufacture and processing industry.

The court case further states that, "...In all such cases, there is nothing patentable unless the applicant by proper showing further establishes a co-action or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function..." This is clearly the case for the presently claimed invention. The results achieved by the invention are new, unexpected, not suggested, and produce useful function as is clearly evident by the enclosed Cornell Report done by Dr. Randy W. Worobo, Ph.D., Department of Food Science and Technology, New York State Agricultural Experimentation Station. The study done uses Applicants' claimed invention to examine and determine the stability of fresh produce sake in the manner claimed (e.g. pasteurization and the

addition of a preservative). This study used pineapple as the exemplary fresh produce. Please refer to the enclosed study for the detailed results.

CONCLUSION

It is respectfully submitted that the case is now in condition for allowance, and an early notification of the same is requested. If it is believed that a telephone interview will help further the prosecution of this case, Applicants respectfully request that the undersigned attorney be contacted at listed telephone number.

Respectfully submitted,

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(A Professional Law Corporation)

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